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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN F. HENDRIX, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The Memorandum Of The United States In Opposition filed by the Solicitor General contends that there is no conflict between the decision below by the Ninth Circuit and the law in the Fifth Circuit as respects the decision in United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970). (Memorandum 3-4)

The Solicitor General contends that Judge Goldberg's original majority opinion, upon which Petitioner relies, became the minority opinion after rehearing, United States v. McKinney, 434 F.2d 831 (5th Cir. 1970) and that this

decision is consistent with the decision below by the Ninth Circuit, and that there is no conflict requiring the attention of this Court. (Memorandum 4-5)

The Memorandum For The United States In Opposition notes that the decision below by the Ninth Circuit failed to cite the decision in United States v. McKinney, 434 F.2d 831 (5th Cir. 1970). (Memorandum 4-5)

Since the decision in United States v. McKinney, 434 F.2d 831 (5th Cir. 1970), the decision by Judge Goldberg in United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) has been cited by the United States District Court, E.D. New York, in United States v. Persico, 339 F.Supp. 1077 (1972) at page 1084 and by the United States District Court, D. Nebraska in United States v. Titsworth, 422 F.Supp. 587 (1976) at pages 589, 591.

The Fifth Circuit continues to cite Judge Goldberg's majority opinion in the United States v. McKinney, 429 F.2d 1019 (1970), upon which Petitioner relies. In United States v. Betner, 489 F.2d 116 (5th Cir. 1974) at page 119, Judge Rives, writing the opinion for the court, states as follows:

> "The duty of the trial court at the time when jury misconduct is alleged was well stated by Judge Goldberg speaking for the majority in United States v. McKinney, 5 Cir. 1970, 429 F.2d 1019, 1026:
>
> > "Implicit in these cases is the assumption that when

> > jury misconduct is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: He must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review."
>
> In that case we remanded the case to the district court with specific directions for an evidentiary hearing and adequate fact findings."

It should be noted that Judge Rives also wrote the opinion for the majority in United States v. McKinney, 434 F.2d 831 (1970). Therefore, the contention of the Solicitor General that there is no conflict between the law in the Fifth Circuit and the decision below by the Ninth Circuit is erroneous, because Judge Rives cites the opinion of Judge Goldberg in United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) as the rule in the Fifth Circuit.

Judge Goldberg's opinion in United States v. McKinney, 429 F.2d 1019 (1970) and Judge Rives opinion (citing Judge Goldberg's opinion) in United States v. Betner, 489 F.2d 116 (1974) was recently cited in United States v. Chintese, 546 F.2d 135 (5th Cir. 1977).

It is therefore respectfully submitted that the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

Dated: 9/28/77

Herman A. Hauslein

HERMAN A. HAUSLEIN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) true copies of the foregoing Petitioner's Reply Brief were mailed, postage prepaid, to the Office of the Solicitor General of the United States on this 29th day of September, 1977.

Herman A. Hauslein

HERMAN A. HAUSLEIN